



1997

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Recommended Citation

Chris Truax, *Why Can't the Football Team Read: The Student Athlete's Right-to-Know Act and the Growing Threat of Liability*, 4 Jeffrey S. Moorad Sports L.J. 301 (1997).

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WHY CAN'T THE FOOTBALL TEAM READ?: THE STUDENT ATHLETE'S RIGHT-TO-KNOW ACT AND THE GROWING THREAT OF LIABILITY

CHRIS TRUAX*

I. INTRODUCTION

*Athletes are just plantation slaves. They're given passing grades to earn money for the plantation. Then, when the athlete's service to the plantation is over, no one cares if he or she has made progress as a student.*¹

College athletics are big business. The National Collegiate Athletic Association (NCAA) earns over \$140,000,000 a year from the sale of broadcast rights for NCAA championships alone.² When coupled with the sale of other broadcast rights, merchandising ties and ticket sales, a successful athletic program can be a valuable source of revenue.

There is a growing public perception that universities have come to define "success" solely in terms of winning games and that the education of student-athletes is, at best, a peripheral concern. Unfortunately, many of the available data reinforce this perception. One study, conducted by the General Accounting Office, showed that at thirty-five of ninety-seven schools with major men's basketball programs, fewer than twenty percent of players graduate within six years of enrollment. Only eight schools had graduation rates above 80%.³

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1. Myles Gordon, *Making the Grade?*, SCHOLASTIC UPDATE, May 1, 1992, at 20 (quoting Jan Kemp, professor at University of Georgia who has studied treatment of athletes at University of Georgia).

2. Leonard Shapiro, *March Madness: Follow the Money*, WASH. POST, March 11, 1994, at C2.

3. See Irvin Molotsky, *No More Than 1 in 5 Athletes Graduating at Many Schools*, N.Y. TIMES, Sept. 10, 1989, at 1. Statistics published by the NCAA suggest that student-athletes actually graduate at a higher rate than that of the general student body. See *Graduation Rates Remain Steady*, NEWSDAY, July 1, 1994 at A65. The NCAA report claims that 57% of all athletes entering Division I schools in the 1987-88 academic year graduated within six years, compared with a 56% rate for non-athletes. These statistics are misleading, however, because they combine rates for athletes participating in such sports as crew and fencing with those for athletes playing on the football and basketball teams. In addition, they say nothing about

The public conception of what constitutes a successful athletic program to universities, coupled with the lucrative nature of university athletics, creates an ideal atmosphere for student-athletes seeking legal redress against universities for their failure to foster academic achievement for student athletes. Despite numerous attempts, however, student-athletes have generally been unable to advance a legal theory which a court will recognize.⁴

Two recent developments may significantly alter this imbalance of power. *Ross v. Creighton*⁵ and the Student-Athlete's Right-to-Know Act (the Act)⁶ combine to provide student-athletes with potentially formidable legal theories, which could result in significant liability for many colleges and universities.

The Act, enacted by Congress in 1991, seeks to minimize the exploitation of student-athletes by requiring institutions to disclose graduation rates for athletes to potential recruits. Though the Act itself contains no penalties for non-compliance, it may create a new cause of action for aggrieved student-athletes.

*Ross v. Creighton*⁷, by contrast, does not recognize a new cause of action, but rather holds that a breach of contract action may be brought against a university when it fails to perform specific promises made to a student-athlete during the recruiting process.⁸ Standing alone, *Ross* represents a significant victory for student-athletes. More importantly, the synergism between *Ross* and the Act⁹

individual schools. For example, the NCAA statistics for classes entering Division I schools in 1983-84 and 1984-85 reveal that at Texas A&M, 67% of the general student body graduated within six years while only 25% of the football team graduated. See Tim Layden, *College Football '92 Bowls, Polls and Lofty Goals*, NEWSDAY, Aug. 23, 1992, at 16. Critics have also pointed out that the statistics for entering classes include part-time students who take more than six years to earn a degree, whereas student-athletes have been full-time students for four years. In other words, graduation rates for the general student body are artificially low because of the large component of part-time students in many colleges, many of whom take more than six years to graduate. California State University students, for example, take an average of five and one-half years to graduate. See Ralph Frammolino, *Wilson Calls for Reforms in College System*, L.A. TIMES, Oct. 14, 1993, at A3. While statistics are not available, it has also been argued that almost 100% of members of the general student body spending four years as full-time students will graduate within six years. Finally, at least one study has called into question the veracity of the graduation statistics reported to the NCAA. See Steve Stecklow, *Cheat Sheets: Colleges Inflate SATs and Graduation Rates in Popular Guidebooks*, WALL ST. J., Apr. 5, 1995, at A1.

4. See Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action be Created for Student Athletes?*, 69 DENV. U. L. REV. 57 (1992).

5. 957 F.2d 410 (7th Cir. 1992).

6. 20 U.S.C. § 1092(e) (1996).

7. 957 F.2d 410 (7th Cir. 1992).

8. See *infra* Part III for a further discussion of such a breach of contract action.

9. 20 U.S.C. § 1092(e) (1996).

creates an entirely new legal environment for athletic recruiting. Part II of this article discusses the Act and the possible tort remedy of "failure to inform" which may flow from it.¹⁰ Part III analyzes the elements of the tort of a "failure to inform."¹¹ Part IV discusses *Ross* and its potential synergism with the Act.¹² Defenses under the Act and strategies for avoiding liability are discussed in Parts V and VI respectively.¹³

II. CREATING A NEW TORT

Traditionally, courts have refused to recognize student claims for "educational malpractice" because of the difficulty in fashioning a standard of care.¹⁴ The same is true for "negligent admission."¹⁵ This difficulty stems from the courts' perception that "different but acceptable scientific methods of academic training [make] it unfeasible to formulate a standard by which to judge the conduct of those delivering the services."¹⁶

The Act creates a duty to disclose on the part of colleges and universities which future plaintiffs may use to supply a hook on which courts may hang a new tort of "failure to inform." The Act, which became operative on July 1, 1992, provides that any institution at which students receive federal financial aid must disclose information on graduation rates broken down by race, sex and sport to potential student-athletes.¹⁷ The Act further provides that

10. See *infra* notes 14-51 and accompanying text.

11. See *infra* notes 52-83 and accompanying text.

12. See *infra* notes 84-115 and accompanying text.

13. See *infra* notes 116-133 and 134-135 respectively and accompanying text.

14. See *Ross v. Creighton*, 957 F.2d 410 (7th Cir. 1992). At least eleven states have explicitly rejected claims for educational malpractice: Alabama, Alaska, California, Florida, Idaho, Iowa, Kentucky, Maryland, New Jersey, New York and Wisconsin. For a list of cases, see *id.* at 414 n.2.

15. "Negligent admission" refers to an institution violating a duty to admit only "reasonably qualified students" with the ability to academically perform. See *id.* at 415.

16. *Id.* at 414 (citations omitted).

17. The text of the Act appears at 20 U.S.C. § 1092(e) (1996) and is reproduced below.

(e) Disclosures required with respect to athletically related student aid.

(1) Each institution of higher education which participates in any program under this subchapter I of Chapter 34 of Title 42 and is attended by students receiving athletically related student aid shall annually submit a report to the Secretary which contains-

(A) the number of students at the institution of higher education who received athletically related student aid broken down by race and sex in the following sports: basketball, football, baseball, cross country/track and all other sports combined;

- (B) the number of students at the institution of higher education, broken down by race and sex;
 - (C) the completion or graduation rate for students at the institution of higher education who received athletically related student aid broken down by race and sex in the following sports: basketball, football, baseball, cross country/track and all other sports combined;
 - (D) the completion or graduation rate for students at the institution of higher education broken down by race and sex;
 - (E) the average completion or graduation rate for the 4 most recent completing or graduating classes of students at the institution of higher education who received athletically related student aid broken down by race and sex in the following categories: basketball, football, baseball, cross country/track and all other sports combined; and
 - (F) the average completion or graduation rate for the 4 most recent completing or graduating classes of students at the institute of higher education broken down by race and sex.
- (2) When an institution described in paragraph (1) of this subsection offers a potential student athlete athletically related student aid, such institution shall provide to the student and his parents, his guidance counselor, and coach the information contained in the report submitted by such institution pursuant to paragraph (1).
 - (3) For purposes of this subsection, institutions may exclude from the reporting requirements under paragraphs (1) and (2) the completion or graduation rates of students and student athletes who leave school to serve in the armed services, on official church missions, or with a recognized foreign aid service of the Federal Government.
 - (4) Each institution of higher education described in paragraph (1) may provide supplemental information to students and the Secretary showing the completion or graduation rate when such completion or graduation rate includes students transferring into and out of such institution.
 - (5) The Secretary, using the reports submitted under this subsection, shall compile and publish a report containing the information required under paragraph (1) broken down by:
 - (A) individual institutions of higher education; and
 - (B) athletic conferences recognized by the National Collegiate Athletic Association and the National Association of Intercollegiate Athletics.
 - (6) The Secretary shall waive the requirements of this subsection for any institution of higher education that is a member of an athletic association or athletic conference that has voluntarily published completion or graduation rate data or has agreed to publish data that, in the opinion of the Secretary, is substantially comparable to the information required under this subsection.
 - (7) The Secretary, in conjunction with the National Junior College Athletic Association, shall develop and obtain data on completion or graduation rates from two-year colleges that award athletically related student aid. Such data shall, to the extent practicable, be consistent with the reporting requirements set forth in this section.
 - (8) For purposes of the subsection, the term "athletically related student aid" means any scholarship, grant, or other form of financial assistance the terms of which require the recipient to

the institution must forward the information annually to the Secretary of Education, who is required to publish a report.¹⁸

While the Act provides no penalties for non-compliance, it does create a statutory duty to disclose graduation rates to potential student-athletes. The failure of an institution to comply with a statutory requirement may give rise to a cause of action sounding in tort. When a legislature creates a duty which did not exist at common law, it creates the potential for a new tort as well.¹⁹ To determine whether or not to create the new tort, the court undertakes a two-prong analysis. In the first prong, the court must determine whether the plaintiff and the plaintiff's injury fall within the ambit of the statute as a matter of law.²⁰ In the second prong, the court must decide whether to grant relief as a matter of public policy.²¹ In addition, the court must consider causation issues, whether the university's failure to inform the student-athlete is the cause of the student-athlete's failure to acquire a satisfactory education.

To satisfy the first prong, the court must determine both whether the plaintiff is a member of the class intended to be protected by the statute and whether the statute was intended to prevent the claimed injury.²² A student-athlete attempting to recover in tort should have little trouble in satisfying both of these elements. As the Act only creates a duty toward potential student-athletes offered athletic scholarships, student-athletes are specifically designated as the protected class. In addition, the root injury claimed in a suit for "failure to inform" is that the plaintiff failed to receive a satisfactory education. Since the Act's findings focus specifically on the poor academic performance of student-athletes,²³ the plaintiff's failure to obtain a degree is one of the harms the statute intends to prevent. The student-athlete, however, still needs to prove that the university's failure to inform is the cause of their failure to acquire a satisfactory education.

participate in a program of intercollegiate athletics at an institution of higher education in order to be eligible to receive such assistance.

20 U.S.C. § 1092(e) (1996).

18. 20 U.S.C. § 1902(e)(5) (1996).

19. See *W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS* § 36, at 221 & n.8 (5th ed. 1984).

20. See *RESTATEMENT (SECOND) OF TORTS* § 874A cmt. i (1979).

21. See *id.* cmt. h.

22. See *id.* cmt. i.

23. "[T]he academic performance of student athletes, especially those receiving football and basketball scholarships, has been a source of great concern in recent years." Act of Nov. 8, 1990, Pub. L. No. 101-542, § 101, 104 Stat. 2381, 2381 (1990).

Given that both the plaintiff and the injury are covered by the statute, the court must next determine whether, as a matter of policy, it should grant relief and create a new tort. The Restatement (Second) of Torts lists six factors a court should consider in determining whether a new tort should be created: 1) the specificity of the legislative provision; 2) the adequacy of existing remedies; 3) the extent to which the tort would supplement or interfere with existing remedies or enforcement; 4) the importance of the interest protected; 5) the extent of the change in tort law; and 6) the burden the new cause of action will place on judicial resources.²⁴ The result of an analysis of these six factors weighs in favor of creating a new cause of action for the student-athletes.

A. The Specificity of the Legislation

The test used for this first factor is whether the legislation is clear in letting both the court and the actor know what conduct is prohibited or required.²⁵ The Act is quite specific. In addition to detailing exactly what information must be compiled,²⁶ it provides that the university must furnish a copy of the report not only to the potential student-athlete, but to his or her parents, coach and high-school guidance counsellor as well.²⁷

B. The Adequacy of Existing Remedies and the Threat of Interference With Them

An analysis of the second and third factors provides that there simply are no existing remedies for the injury, and, therefore, no potential interference from recognizing a new cause of action. Despite numerous attempts, student-athletes have been unable to convince courts to recognize a cause of action, much less provide a remedy.²⁸ Furthermore, recognizing a tort of "failure to inform" would not interfere with enforcement provisions in the Act itself. In this respect, the Act differs markedly from the Family Education Rights and Privacy Act (FERPA).²⁹ FERPA creates a right to review educational records,³⁰ to challenge their content under certain

24. See RESTATEMENT (SECOND) OF TORTS § 874A cmt. h (1979).

25. See *id.* cmt. h(1).

26. See 20 U.S.C. § 1092(e)(1) (1996).

27. See *id.* § 1092(e)(2).

28. See generally Davis, *supra* note 4 for additional information concerning these prior attempts to recognize a cause of action.

29. See 20 U.S.C. § 1232(g) (1996).

30. See *id.* § 1232(g)(a)(1)(A).

conditions³¹ and to prevent their release.³² Provisions of FERPA provide that educational institutions not in compliance can be denied federal funding.³³ As a result of these provisions, courts have consistently held that this is the exclusive remedy available under FERPA.³⁴ The Act, by contrast, contains no enforcement provisions whatsoever.³⁵ Thus, there is neither a statutory nor a common law remedy with which a new cause of action could interfere.

C. The Importance of the Interest Protected

In passing the Act, Congress noted in its findings that "[e]ducation is fundamental to the development of individual citizens and the progress of the Nation as a whole."³⁶ It also found that "[m]ore than 10,000 athletic scholarships are provided annually by institutions of higher education."³⁷ Thus, Congress intended for the Act to vindicate an interest critical to society.

Education is even more critical from the perspective of the individual. Aside from any metaphysical benefits, those with college degrees generally have greater earning potential than those without,³⁸ although this distinction is irrelevant when considering the salaries of professional athletes. Courts uniformly recognize impaired earning capacity as a protectable interest.³⁹ Thus, the forth

31. See *id.* § 1232(g)(a)(2).

32. See *id.* § 1232(g)(b).

33. See *id.* § 1232(g)(a)(1)-(2), (b)(1).

34. See, e.g., *Girardier v. Webster College*, 563 F.2d 1267, 1276-77 (8th Cir. 1977). Note, however, that some courts have held that while there is no private right of action under FERPA, it does create a right that can be vindicated in an action for damages under 42 U.S.C. § 1983 (1988). See *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2nd Cir. 1986). A discussion of the application of 42 U.S.C. § 1983 to the Act is beyond the scope of this article.

35. This, by itself, suggests that Congress may have intended to create a private federal right of action under the Act in keeping with the maxim *Ubi jus, ibi remedium* (where there is a right, there is a remedy). In any event, the tort of "failure to inform" is a creature of state common law. Thus, its existence does not depend wholly on a Congressional intent to allow private enforcement of the Act. See RESTATEMENT (SECOND) OF TORTS § 874A cmt. g (1979).

36. Act of Nov. 8, 1990, Pub. L. No. 101-542, § 102, 104 Stat. 2381, 2381 (1990).

37. *Id.* § 102(5) at 2381.

38. College graduates earn an average of 99% more than those who have only graduated from high school. See Kerry Hannon, *How You're Getting Stuffed by the Student Loan Mess*, MONEY, May 1992, at 164. This gap is growing. In the 1980's, real average family income for adults in their prime earning years (age 22-48) grew more than twice as fast for college graduates than it did for those who were not. See Stephen J. Rose, *Declining Family Incomes in the 1980's*, CHALLENGE, Nov.-Dec. 1993 at 29.

39. See DAN B. DOBBS, LAW OF REMEDIES § 8.1(2), at 649-50 (2d ed. 1993).

factor to be considered by the court weighs in favor of creating the new tort.

D. The Extent of the Change in Tort Law

The new tort is very similar to a number of other recognized causes of action.⁴⁰ A court could reach much the same result of other causes of action by recognizing the existence of a confidential relationship between an educational institution and a potential student-athlete. Such a relationship creates a duty to disclose material information⁴¹ and exists whenever "one party to a transaction justifiably believes the other is looking out for his interests."⁴² Failure to disclose under these circumstances will support an action for deceit.

A recent case, *Sperau v. Ford Motor Company*,⁴³ presented a situation remarkably similar to one that might arise under the Act. In *Sperau*, the Alabama Supreme Court upheld a judgment in favor of the plaintiff based on failure to disclose in a confidential relationship.⁴⁴ Ford heavily recruited the plaintiff, a minority, to become a Ford franchisee.⁴⁵ Ford knew, but failed to disclose to the plaintiff, that minority-owned franchises had a much higher failure rate than the average Ford franchise.⁴⁶ On appeal, Ford argued both that failure rates for its franchises, broken down by race, were not material and that even if such rates were material, Ford had no duty to disclose them in an arm's-length business transaction.⁴⁷

The court held that there was sufficient evidence for a jury to find that "race based" failure rates were material.⁴⁸ In addition, the court found ample evidence (especially regarding Ford's intense recruitment of Sperau) from which a jury could determine the

40. The tort of deceit is an example of a similar cause of action.

41. Material information that a tort for failure to inform would create a duty to disclose might include, for example, graduation rates of prior student-athletes and the percentage of those student-athletes who continue on to post graduate studies.

42. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 9-20, at 369-70 (3d ed. 1987).

43. 674 So. 2d 24 (Ala. 1995), *cert. granted, vacated and remanded on other grounds*, 116 S. Ct. 1843 (1996).

44. 674 So. 2d 24 (Ala. 1995).

45. *See id.*

46. *See id.*

47. *See id.* at 29-31.

48. *See id.*

existence of a confidential relationship between Ford and the plaintiffs.⁴⁹

Future student-athlete plaintiffs will likely seek to bring similar causes of action. Indeed, merely substituting “athlete” for “franchisee” in the foregoing synopsis suggests that many student-athletes to whom graduation rates have not been disclosed may have a cause of action materially indistinguishable from that in *Sperau*. Arguably, it will be even easier for student-athlete plaintiffs to establish a confidential relationship, as collegiate athletic recruiting is not generally thought of as an “arm’s length business transaction.”⁵⁰

E. The Burden the New Cause of Action Will Place on Judicial Resources

Courts’ hesitancy to recognize causes of action brought by student-athletes for inadequate education stems partly from solicitude for judicial resources.⁵¹ Unlike “negligent admission” or “educational malpractice”, the new tort would not require the court to determine the appropriate standard of care. Problems, however, arising out of proving causation will burden judicial resources to some extent due to the nature of the action. Admittedly, it will be difficult to establish a causal link between the failure of the university to inform the student-athlete and the student-athlete’s failure to acquire an adequate education. Thus, it is questionable whether the new tort would represent more of a drain on judicial resources than professional malpractice or even ordinary negligence. This conclusion is based on a balancing of the burdens placed on the court. While the court will have to determine the causation issue, it will not have to determine the appropriate standard of care.

III. “FAILURE TO INFORM”

A. Elements of the Cause of Action

The foregoing discussion suggests that recognizing a duty toward potential student-athletes based on the Act is well within the sphere of judicial prerogative. What, then, must a student-athlete prove to recover under the new tort? Assume the following hypothetical. Universities X and Y recruit student A to play basketball.

49. See *Sperau*, 674 So. 2d at 29-31.

50. See *infra* note 117 and accompanying text.

51. “A final reason courts have cited for denying this cause of action is that it threatens to embroil the courts into overseeing the day-to-day operations of schools.” (citations omitted). *Ross*, 957 F.2d at 414.

University X successfully recruits A but fails to provide any information that the Act requires. A plays out four years of eligibility, but is academically disqualified at the end of the fifth year.

As a threshold element, A must show that X is bound by the Act, in that X received federal student aid and offered A "athletically related student aid." Assuming that the Act binds University X, it will then have a duty of disclosure to A, as well as a duty to provide information to A's parents, high school guidance counselor and coach.⁵² Since the new tort involves the breach of a duty owed to A, it can be analyzed in the same manner as a negligence cause of action.⁵³ To prevail, therefore, A must demonstrate that the institution violated the Act and that but for the violation, A more probably than not, would have received a degree.

The first element is no more difficult to prove than any other question of fact. X either complied with the Act or it did not. Since the Act is quite specific as to who must receive the information,⁵⁴ A should have little difficulty demonstrating that X did not comply with the Act if the required disclosures were not made.

Cause-in-fact, however, poses a more difficult problem. A must show both that, more probably than not, but for X's failure to comply with the Act, A would have chosen Y, and had A done so, A would more probably than not have received a degree. Taking these issues in reverse order. A may be able to carry the burden of proof if the graduation rates for similarly situated student-athletes are sufficiently disparate.⁵⁵ If, for example, X graduates ten percent of its student-athletes while Y graduates ninety percent, A, more probably than not, would have graduated had A attended University Y.⁵⁶ While these statistics will be considered by the court

52. See 20 U.S.C. § 1092(e)(2) (1996).

53. While a cause of action for deceit based on the University's duty to disclose graduation rates to A could also be made out, a theory of negligence is preferable. Though it may make little practical difference in this context, deceit often requires both scienter and intent. See KEETON *supra* note 19, § 105 at 728.

54. See 20 U.S.C. § 1092(e)(2) (Supp. IV 1992).

55. In some respects, this problem is analogous to medical malpractice cases in which there is a probability that the eventual injury would have occurred even in the absence of negligence. The traditional rule allows for recovery only when the risk of injury has been increased from under 50% to over 50%. The author suggests that the mathematically better rule would allow recovery whenever the risk of injury has been more than doubled by the defendant's conduct. For a critique of the traditional rule, see Herskovits v. Group Health Coop., 664 P.2d 474 (Wash. 1983).

56. In *Ross*, the court was concerned that "it may be a 'practical impossibility [to] prov[e] that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student.'" *Ross*, 410 F.2d at 414 citing *Donohue v. Copiague Union Free School Dist.*, 391 N.E.2d 1352, 1355 (N.Y. 1979) (Wachtler, J.,

in determining whether causation is proven, they will not, in and of themselves, be determinative in resolving the causation issue.

The more interesting issue is whether A would have chosen Y instead of X, had X complied with the Act. This can be assessed under either an objective or a subjective standard. The plaintiff will be arguing for the former while the defendant will argue for the latter. Given the small number of student-athletes who are able to turn professional,⁵⁷ the student-athlete choosing under the objective standard would act as a reasonably prudent person and almost always choose the institution which offered the best opportunity to obtain a degree, especially when, as here, there is a great disparity in graduation rates. Thus, the objective standard operates under the assumption that the goal of the student-athlete is to obtain a degree. Conversely, the defendant would argue for the subjective standard. In other words, the defendant would argue the plaintiff would have chosen to "go for the glory" and hope to turn professional rather than opt for the less glamorous but more certain college degree, even if probability of the student-athlete turning professional is minimal at best.

The better course would be for the courts to apply the objective standard. The *raison d'être* of the Act is to enable potential student-athletes to make an "informed judgment."⁵⁸ In addition, the requirement that the information be sent to the student's parents, guidance counsellor and coach⁵⁹ strongly suggests that the Act envisions a reasonably prudent decision.

It appears, then, that an action brought for "failure to inform" will present few contestable issues. Ignoring the question of damages and assuming the court adopts the objective standard for causation, the only questions of fact open to dispute are whether the institution complied with the Act and whether the plaintiff received

concurring). Note that this is not an issue here as the injury to the plaintiff does not flow from educational misfeasance but rather from the plaintiff's failure to attend an institution at which the plaintiff, more likely than not, would receive a degree.

57. Statistics released by the National Federation of State High School Associations indicate that only about 2% of college athletes who play basketball, football or baseball will ever sign a professional contract. In basketball, for example, even a starting player at a Division I school has only about a 3.5% chance of ever actually playing on an NBA team. See Darrell Lang, *How Many Athletes Make It to the Pros?* CURRENT HEALTH, Jan. 1992 at 16.

58. "[K]nowledge of graduation rates would help prospective student-athletes make an informed judgment about the educational benefits available at a given institution of higher education." Act of Nov. 8, 1990, Pub. L. 101-542, 104 Stat. 2381, 2381.

59. See 20 U.S.C. § 1092(e)(2) (Supp. IV 1992).

an offer from another institution with sufficiently disparate graduation rates. Conceivably, an institution might attack the applicability of the graduation statistics to A. It might, for example, argue that A has a learning disability which would have prevented A from receiving a degree even, if A attended the institution with the higher graduation rates. There are several problems with this strategy. First, since it is a purely factual question, such an argument would not prevent the plaintiff from reaching a jury. It must therefore be handled with extreme delicacy, as it may create the inference that A was being intentionally exploited by the defendant. At the very least, it raises the question of when the institution knew or should have known about A's disability. In addition, many cases will not present the factual basis on which to make this argument.

Second, by arguing that the plaintiff would have been unable to receive a degree from any university, the defense may be admitting a critical element of a *Ross*-type claim for breach of contract.⁶⁰ In the extreme case, a student-athlete plaintiff might be entitled to judgment on the pleadings if he or she also seeks to void the contract.⁶¹

A defendant university may also be denied its most obvious and potentially effective affirmative defense: the plaintiff's contributory negligence. The defense is not available when a defendant's negligence has been "willful."⁶² Thus, a university which intentionally violates the Act will not be able to set up the plaintiff's failure to study as a defense, although the plaintiff's failure to study will be invoked in the causation analysis. In jurisdictions with pure comparative negligence, the student-athlete's bad study habits will not be a complete bar to recovery even if the university's failure to comply with the Act was due to only ordinary negligence.⁶³

Another affirmative defense that a university may assert is the doctrine of avoidable consequences. Under this defense, the plain-

60. See *infra* notes 89-114 and accompanying text for a discussion of the elements in a *Ross*-type claim.

61. See *id.* This may be true even if the university had no knowledge of the plaintiff's condition at the time the plaintiff was recruited. If both parties contemplated that the plaintiff would be able to receive an education when, in fact, he or she was unable to do so, there would be a mutual mistake of fact and the contract could be voided at the plaintiff's option. This, of course, raises the possibility of other defenses which are beyond the scope of this Article. See CALAMARI & PERILLO *supra* note 42, § 9-26 at 379.

62. See KEETON ET AL., *supra* note 19, § 65 at 462.

63. The plaintiff student-athlete may recover substantial damages even if he or she was much more at fault than was the university. See *id.* § 67 at 471-73.

tiff is required to use "reasonable efforts to mitigate damages."⁶⁴ The effort to mitigate must only be reasonable: there is no requirement that the efforts be successful.⁶⁵ There are two exceptions to the doctrine: leases of real property⁶⁶ and non-exclusive contracts.⁶⁷ These exceptions would not apply here, as the contract between the student-athlete and the university is exclusive. The university, therefore, would assert that the plaintiff failed to mitigate the university's failure to inform by not researching the graduation rates for themselves or by studying enough to insure that the plaintiff would graduate. A student-athlete plaintiff could easily circumvent this defense by showing "reasonable" efforts to mitigate; it is not necessary that the plaintiff graduated from the university. Thus, the determination would turn on what efforts the court would deem reasonable.⁶⁸

Ironically, the line of cases barring student-athletes from recovering for "educational malpractice" may now, in turn, bar universities from establishing contributory negligence. Contributory negligence, as well as the doctrine of avoidable consequences, are affirmative defenses and must be established by the defendant.⁶⁹ Defendant universities, then, must now face the twin hurdles of establishing a standard of care⁷⁰ and proximate cause previously reserved for student-athlete plaintiffs. The university will argue that the plaintiff was contributorily negligent for failing to follow its educational guidelines, e.g., attend class, do homework, et cetera. Contributory negligence, however, is subject to the same principles of causation as ordinary negligence.⁷¹ Thus, the defendant must prove that the plaintiff would have received a degree had he or she followed the guidelines. In other words, the university must prove the efficacy of its educational system, an inquiry courts have almost uniformly refused to make.⁷² If the court does allow the university to prove the plaintiff's negligence, it will be in the anomalous posi-

64. CALAMARI & PERILLO, *supra* note 42, § 14-15 at 611.

65. *See id.*

66. *See id.* at 612.

67. *See id.*, § 14-16 at 613.

68. *See id.*, § 14-15 at 611. "Under the rule of reasonableness, the wronged party need not act if the cost of avoidance would involve unreasonable expense." *Id.* (citations omitted).

69. *See KEETON ET AL.*, *supra* note 19, § 65 at 451.

70. *See supra* note 17 and accompanying text for further discussion of the standard of care.

71. *See KEETON ET AL.*, *supra* note 19, § 65 at 456.

72. *See Ross*, 957 F.2d at 414.

tion of allowing the defendant to defend its educational techniques while refusing the plaintiff the opportunity to challenge them.

B. Damage Issues

As the facts in a given case may support a variety of causes of action, a range of measures of damages may be available.⁷³ While a full treatment of damages is beyond the scope of this Article, the following represents a survey of some of the more important issues.

1. *Punitive Damages*

The main advantage of a tort cause of action over one in contract is the availability of punitive damages. Punitive damages may be awarded when the defendant's act was "deliberately wrongful" and "known to be injurious to another."⁷⁴ Thus, punitive damages should be available to student-athlete plaintiffs whenever the institution is aware of the Act but has a policy of non-compliance.

It may also be the case, however, that while the institution has no policy of non-compliance, individual coaches and recruiters may choose not to comply. In general, the institution would still be liable for any punitive damages assessed, as the majority of courts have held employers vicariously liable for punitive damages assessed against employees.⁷⁵ A number of the remainder will hold the employer vicariously liable if the employee is in a management position.⁷⁶ Thus, the "deliberately wrongful" acts of a head coach who actively recruits student-athletes may trigger an institution's liability for punitive damages.

Any punitive damage awards made are likely to be quite large. Punitive damages are designed not to compensate the plaintiff but to deter the defendant.⁷⁷ Thus, it is proper to examine not only the benefit derived from the tortious activity,⁷⁸ but the financial position of the defendant as well.⁷⁹ An institution with a policy of non-compliance with the Act could, therefore, be assessed punitive damages as a percentage of its net athletic revenue for the sport in which the plaintiff participated, rather than merely as a multiple of the plaintiff's compensatory damages.

73. See KEETON ET AL., *supra* note 19, § 105 at 734-35.

74. *Id.* § 2 at 10 & n.24.

75. See *id.* § 2 at 13.

76. See DOBBS, *supra* note 39, § 3.11(6) at 334.

77. See KEETON ET AL., *supra* note 19, § 2 at 9.

78. See DOBBS, *supra* note 39, § 3.11(14) at 353.

79. See Annotation, *Punitive Damages: Relationship To Defendant's Wealth As Factor In Determining Propriety Of Award*, 87 A.L.R. 4th 141 (1991).

2. *The Aleatory Performance Problem*

When a student-athlete plaintiff suing for "failure to inform" can demonstrate that "but for" the university's breach, he or she would, more likely than not, have received a degree, there should be full recovery of the value of the degree.⁸⁰ In many cases, however, a plaintiff will only be able to demonstrate that the university's breach decreased his chances of receiving a degree.⁸¹ The value of a chance is, in general, only recoverable if the performance due is to be aleatory, that is, if performance is predicated on an event beyond the control of the parties.⁸² To illustrate, suppose the plaintiff purchases a lottery ticket. Subsequently, the lottery is canceled because too few tickets have been sold. The plaintiff is entitled to recover his pro-rata share of the prizes that were to be offered. If, for example, the prize is \$1000 but only 100 tickets have been sold at one dollar each, the plaintiff will recover ten dollars.

Regardless of the proceeding analysis, the problem facing potential student-athlete plaintiffs is that earning a degree is not like winning the lottery; a student's academic performance is largely within his or her control. Thus, the performance would not be aleatory and, presumably, the value of the chance to earn a degree would not be recoverable.⁸³

IV. CONTRACT THEORIES

The disclosure provisions of the Act will put many athletic recruiters on the horns of a dilemma. If they fail to disclose their universities' graduation rates, their universities may be liable in tort. If, on the other hand, they do disclose but try to do "damage

80. Courts often calculate the present value of a college degree, usually in the context of a divorce proceeding. See, e.g., *Lewis v. Lewis*, 448 N.W.2d 735 (Mich. Ct. App. 1989).

81. For example, suppose A, a potential student-athlete, had a choice between University X with a 10% graduation rate and University Y with a 40% graduation rate. While A has a significantly greater chance of graduating from University Y, there is only a 33% probability that A's failure to graduate was caused by A's failure to attend University Y. In other words, A cannot show A's failure to graduate was more likely than not a result of attending University X because there is a 60% chance A would still not have graduated had A attended University Y.

If, on the other hand, University X had a 60% graduation rate while University Y had a 90% graduation rate, A should be able to recover the full value of the degree, because there is a 75% probability that A's failure to graduate was due to A's failure to attend University Y.

82. See CALAMARI & PERILLO, *supra* note 42, § 14-10 at 605.

83. To mitigate this problem, plaintiffs who cannot satisfy the "but for" test will likely instead seek to void the contract, by arguing the university had a duty to disclose its graduation rates but failed to do so.

control," perhaps by denigrating the accuracy of the statistics as applied to an individual potential student-athlete or by offering a potential student-athlete special assistance to improve his or her chances of graduation, their universities may be liable on a cause of action sounding in contract.

While recognizing that universities and student-athletes have a contractual relationship,⁸⁴ courts have been hesitant to inquire into an institution's performance of its contractual duties.⁸⁵ This hesitancy springs from many of the same concerns, especially the difficulty in crafting a standard of care, which have dissuaded courts from recognizing "educational malpractice."⁸⁶ In *Ross v. Creighton*,⁸⁷ however, the Seventh Circuit Court of Appeals, sitting in diversity and applying Illinois law, recognized that a deal is a deal and held that a student-athlete may hold a university liable for breach of contract when the university violates specific promises.⁸⁸

The plaintiff in *Ross* attended Creighton University on a basketball scholarship.⁸⁹ At the time of his admission, he was dismally unprepared to compete in Creighton's academic environment.⁹⁰ Before accepting the scholarship, Ross, aware of his academic limitations, sought and received assurances from Creighton that he would receive sufficient tutoring to enable him to "receive a meaningful education while at Creighton."⁹¹ The plaintiff, however, did not receive the promised tutoring.⁹² When he finally left Creighton, after exhausting his eligibility, Ross had the language skills of a fourth-grader and the reading skills of a seventh-grader.⁹³ While declining to examine the educational malpractice claims, the court held that the plaintiff's claim that Creighton had breached its commitment to provide specific services made out a cause of action for

84. See *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (N.C. Ct. App. 1972). See also *Ross v. Creighton*, 957 F.2d 410 (7th Cir. 1992).

85. See generally, *Davis supra*, note 4.

86. *Ross*, 957 F.2d at 416 (7th Cir. 1992).

87. See *id.*

88. See *id.* at 417. The court noted that Mr. Ross's "specific and narrow claim" could be adjudicated "without second-guessing the professional judgment of the University faculty on academic matters." *Id.*

89. See *id.*

90. "[H]e scored in the bottom fifth percentile of college-bound seniors taking the American College Test, while the average freshman admitted to Creighton with him scored in the upper twenty-seven percent." *Id.* at 411.

91. *Id.*

92. See *Ross*, 957 F.2d at 411.

93. See *id.* at 412.

breach of contract sufficient to survive a motion to dismiss for failure to state a claim.⁹⁴

Combining the Act with the *Ross* holding places athletic recruiters in a liability mine-field. First, some athletic recruiters will have a strong incentive to misrepresent the data they must provide to potential student-athletes under the Act. Secondly, they will be under extreme pressure to make promises to reluctant recruits similar to those held actionable in *Ross*.

A. Misrepresentation

Suppose that a recruiter from university X and a recruiter from university Y are both pursuing potential student-athlete A. Both comply with the Act. University X, however, reports a ten percent graduation rate for student-athletes similar to A, while university Y reports a ninety percent rate. Obviously, X's recruiter will be severely tempted to misrepresent both the significance of university X's graduation rate and the veracity of Y's. Under what conditions will the contract be voidable by A for misrepresentation? Misrepresentation requires: "(1) representation, (2) falsity, (3) scienter, (4) deception, and (5) injury."⁹⁵ We will assume the element of falsity is satisfied.

1. *Representation*

A specific statement of what purports to be a fact is, of course, a representation. A representation need not, however, be a specific statement. Any affirmative act is a representation.⁹⁶ If the act is designed to hide the truth, it may result in liability for misrepresentation.⁹⁷

A representation must concern fact. A representation of opinion will not support an action for misrepresentation.⁹⁸ "Puffery" or "sales talk" is deemed opinion, not fact.⁹⁹ Thus, a recruiter's statement that, "[w]e have the best program in the country" would probably not be actionable. This, however, is a dangerous game to play.

94. See *id.* at 417.

95. CALAMARI & PERILLO, *supra* note 42, § 0-13 at 356 (citation omitted). These elements are similar to those of the tort of deceit. They are, however, "far less demanding than those necessary to make out a tort cause of action." See *id.*

96. See KEETON ET AL., *supra* note 19, § 106 at 736. Opening and reading mail, for example, is a representation that the actor has a legal right to do so.

97. See CALAMARI & PERILLO, *supra* note 42, § 9-20 at 367.

98. See *id.* § 9-17, at 361.

99. "The 'puffing rule' amounts to a seller's privilege to lie his head off, so long as he says nothing specific" KEETON ET AL., *supra* note 19, § 109 at 757.

There is a fine line between fact and opinion; if the court's sympathies are with the plaintiff, there is little to prevent the court from finding almost any representation relied upon was one of fact.¹⁰⁰

2. *Scienter*

In this context, scienter is an intent to deceive.¹⁰¹ This is not, however, a determinative element for our purposes. Since our hypothetical representation would concern graduation rates, scienter may be deemed material.¹⁰² While a knowing and material misrepresentation will support an action for misrepresentation,¹⁰³ an unknowing misrepresentation of a material fact will support an action for mutual mistake.¹⁰⁴ In either case, the injured party may void the contract.¹⁰⁵

3. *Deception*

This element closely relates to the "puffing" rule and is essentially a question of cause-in-fact. At issue is whether the plaintiff had a right to rely on the defendant's misrepresentation, whether the plaintiff relied on the misrepresentation and whether the plaintiff was actually deceived by the misrepresentation.¹⁰⁶ Modern courts usually find, as a matter of law, that the plaintiff had a right to rely on a defendant's intentional misrepresentation.¹⁰⁷

Whether or not, however, the plaintiff actually did rely on the misrepresentation and was deceived are questions of fact.¹⁰⁸ In the

100. See CALAMARI & PERILLO, *supra* note 42, § 9-17, at 361.

101. See *id.* at 356-57. "Where the representation is made with the knowledge of its falsity, with an intent to deceive and that it shall be acted upon in a certain way, the scienter element of tort liability is made out." *Id.*

102. "Materiality exists whenever the misrepresentation would be likely to affect the conduct of a reasonable man . . ." *Id.* § 9-14, at 357. Since a reasonable person attends college to get an education, graduation rates would always be material.

103. See *id.*

104. See *id.* § 9-26, at 379.

105. See CALAMARI & PERILLO, *supra* note 42, § 9-26, at 379; *id.* § 9-23, at 373. A discussion of the implications of a voided contract, for example, whether the student-athlete would be required to repay to the university expenses and fees paid on its behalf, is beyond the scope of this article.

106. See *id.* § 9-15, at 358.

107. See *id.* § 9-15, at 358-59. "It is the exceptional case today where, especially in the face of an intentional misrepresentation relief will be denied on the ground of the undue credulity or negligence of the defrauded party." *Id.*

108. See *id.* § 9-15, at 358. "[W]hether the party did in fact rely upon representation, it would appear that the question is preeminently a question of fact." *Id.*

case of a material misrepresentation, there is a rebuttable presumption of deception and reliance.¹⁰⁹

4. *Injury*

Generally, some pecuniary injury is a necessary element of a misrepresentation cause of action.¹¹⁰ Some authority indicates, however, that in the case of a material misrepresentation, damage will be presumed.¹¹¹ Student-athletes should be able to demonstrate injury if the graduation rates of at least one university that recruited them were higher than the university they attended whose recruiter made the misrepresentation. Thus, student-athlete A can make out a claim of misrepresentation or mutual mistake whenever X's recruiter made a misstatement about the information required by the Act.

5. *Measuring Damages*

Once the injured party has voided the contract, restitution is the appropriate remedy.¹¹² Generally, restitution for services is available in the amount of the services' fair market value.¹¹³ A successful plaintiff will normally recover the reasonable value of the services rendered.¹¹⁴ In many instances, however, there is no market from which the reasonable value for the services might be ascertained. In the case of student-athletes, this calculation will be problematic since there is no market from which the services of a student-athlete may be valued. Thus, under restitution, both the university and the student-athlete would have to return any benefits received under the contract.

In order to determine what constitutes an appropriate remedy, it is therefore necessary to determine what benefits were received by each party to the contract. Some of the benefits to the student-athlete include an opportunity to attend the university (admission),

109. *See id.* at § 9-15, at 358-59. "A rebuttable presumption of deception and reliance arises if the misrepresentation is material." *Id.*

110. Note, however, that this pecuniary injury is not the amount of the plaintiff's recovery. It is merely a necessary element to make out a cause of action in misrepresentation, thus rendering the contract voidable by the injured party. *See id.* § 9-16 at 359-360.

111. *See* CALAMARI & PERILLO, *supra* note 42 § 9-16, at 360. "A frequently cited case stated that whenever misrepresentation is material, damage will be presumed." *Id.*

112. *See id.* § 9-23, at 373-75.

113. *See* DOBBS, *supra* note 39, § 12.18, at 428. In some cases, consequential benefits may also be available to plaintiffs seeking restitution. *See id.* at 431.

114. *See id.*

partial or full scholarship (funds) and a forum in which to showcase their athletic abilities for professional recruiters. Benefits attributable to the university include improving the quality of the athletic team. The implications and subsequent economic benefits derived from this benefit must be ascertained on a case-by-case basis, depending on the success of the athletic team. Nevertheless, these types of benefits may be difficult to attach a monetary value to, thereby making the damages issue of the new tort problematic. Although there is no bright-line rule, perhaps student-athletes could look to cases with contract valuation issues for professional athletes for guidance.

B. Breach of Contract

If X's recruiter does not misrepresent X's graduation rates, the recruiter may come under considerable pressure from the parents of a prospective student-athlete, if not from all the parties to whom the information is required to be distributed.¹¹⁵ Assuming that these parties wish to see the student-athlete receive an education, they will be justifiably concerned that only one in ten student-athletes similarly situated to A ever graduates. Quite likely, these parties will seek specific assurances from the university that the student-athlete will actually receive an education. Under the *Ross* holding, these types of specific promises would be enforceable against X. Failure to fulfill them would be a breach of contract and could trigger significant liability.

V. DEFENSES UNDER THE ACT

Just as the Act gives, the Act also takes away. The Act provides that:

The Secretary shall waive the requirements of this subsection for any institution of higher education that is a member of an athletic association or athletic conference that has voluntarily published completion or graduation rate data or has agreed to publish data that, in the opinion of the Secretary, is substantially comparable to the information required under this subsection.¹¹⁶

On its face, this section of the Act appears to prove that by obtaining a waiver from the Secretary, the institution would be ex-

115. See 20 U.S.C. § 1092(e)(2) (Supp. IV 1992).

116. *Id.* § 1092(e)(6).

empt from both the reporting requirement and the duty to provide potential student-athletes with the otherwise required information. It would be a mistake, however, to limit the interpretation of this statute to its four corners. First, a court may construe the Act to require a university to disclose the information directly to prospective student-athletes even if a waiver has been granted. Second, under some circumstances, common law doctrines could operate to require disclosure, regardless of whether a university has obtained a waiver.

A. Scope of the Waiver

In passing the Act, Congress sought to ensure that potential student-athletes would have “knowledge of graduation rates” sufficient to allow them to “make an informed judgment about the educational benefits available at a given institution of higher education.”¹¹⁷ To effectuate this intent, the Act contains three types of provisions: reporting provisions detailing what information a university must compile,¹¹⁸ disclosure provisions detailing who must receive the information¹¹⁹ and publication provisions.¹²⁰ Of these, the reporting and disclosure provisions are central to the legislative purpose, while the publication requirement is largely peripheral.

To illustrate, suppose the Act contained no publication requirement but strictly required all universities to disclose graduation rates to prospective student-athletes. Even though no single, comprehensive source existed, prospective student-athletes would always have sufficient information on recruiting universities’ graduation rates from which they could make an “informed judgment” about which university to attend.

By contrast, suppose the Act required only publication without specifying (as the Act does not) how the information must be published. Hypothetically, an athletic conference could choose to comply by publishing the information in a series of legal notices in a newspaper in American Samoa. This would completely subvert the purpose of the Act; prospective student-athletes would be in no better position to make an “informed judgment” than they would be had the Act not been passed.

117. Act of Nov. 8, 1990, Pub. L. No. 101-542, § 101, 104 Stat. 2381, 2381 (1990).

118. See 20 U.S.C. § 1092(e)(1), (3)-(4) (Supp. IV 1992).

119. See *id.* § 1092(e)(2).

120. See *id.* § 1092(e)(5). Sub-section (6), dealing with waiver, includes a self-publication alternative. See *id.* § 1092(e)(6).

Congress could not, therefore, have reasonably intended to allow the Secretary to exempt institutions from both the reporting requirement and the duty to provide the information to potential student-athletes, as such an interpretation would lead to "futile results."¹²¹ Rather, the intent of Congress must have been to allow the Secretary to waive only the duplicative governmental reporting requirement and not the provision which requires the university to provide the report directly to the prospective student-athlete.

The structure of the Act provides a colorable argument for this proposition. The code section which provides for waiver "of this subsection" appears at the highest subsection level in the Act.¹²² Read strictly, then, a waiver should exempt an institution from all of the Act's requirements. Clearly, however, an institution remains bound by some parts of the Act, such as the requirement to collect graduation data, even after it has received a waiver. Thus, a waiver cannot be a blanket exemption; its scope must be determined by some other standard. As noted above, since waiving the requirement that information be provided directly to student-athletes would frustrate the intent of Congress, it is not within the scope of the Act. Arguably, then, when the Secretary waives the requirements of the Act, it is only with respect to those requirements owed to the Secretary, such as the reporting requirement.

In any event, as it is within the scope of a common law court to recognize new duties¹²³ and thereby create new torts that have no ground in legislative intent,¹²⁴ a court is equally free to imply a duty out of a statute which furthers the purposes of a statute, even if the duty goes beyond that which the statute requires. This is especially true when the statute's technical requirements appear to defeat the statute's fundamental purpose. Thus, a court could interpret the Act as creating a duty to provide student-athletes with the required information, even if the university had received a waiver.¹²⁵

121. See *United States v. American Trucking Ass'n.*, 310 U.S. 534, 543 (1940) (stating that courts must follow purpose of legislation rather than plain meaning when strict interpretation of statute's language would create futile or absurd results).

122. See 20 U.S.C. § 1092(e)(6) (Supp. IV 1992).

123. The court could, for example, merely recognize a relationship between a university and a potential student-athlete confidential per se. See *KEETON ET AL.*, *supra* note 19, § 106, at 738.

124. See, e.g., *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972) (informed consent); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Ca. 1944) (Traynor, J., dissenting) (strict liability).

125. As a practical matter, it is unlikely a court would be sympathetic to a defendant who had obtained a waiver but had not provided the information directly to the potential student-athlete. Once the report has been compiled, the

claim of misrepresentation,¹³⁵ it will be very useful when confronted with a *Ross*-type claim for breach of a specific contractual provision; 4) require potential student-athletes and their parents to sign and return a copy of the information required by the Act. This will provide a valuable defense against claims based on the new tort and those based on misrepresentation.

In conclusion, the legal environment in which athletic recruiting takes place is radically different from what it was even five years ago. Student athletes now have potential causes of action sounding in both tort and contract, should they be unable to complete their college educations. Nor is the Act and the *Ross* decision aberrations. Rather, they are manifestations of a trend. Both Congress and the courts have shed much of the deference they had previously accorded educational institutions. Growing numbers of student athletes are likely to take advantage of this more favorable climate and seek legal redress. Consequently, this altered climate requires every university to take immediate steps to immunize its athletic recruiting program from potential liability.

135. See CALAMARI & PERILLO, *supra* note 42, § 9-21, at 371. "A general merger clause is not deemed to bar parol evidence of misrepresentation, but a specific merger clause disclaiming specific representation is deemed to bar such evidence." *Id.*

